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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RYAN JACKSON, MAJORITY STAFF DIRECTOR
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February 26, 2016

The Honorable Shaun Donovan
Director
The Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Dear Director Donovan:

The Senate Committee on Environment and Public Works (EPW) has been conducting oversight of the U.S. Environmental Protection Agency's (EPA) "Waters of the United States" rulemaking under the Clean Water Act. To generate support for the controversial rule, EPA engaged in a public relations blitz across the internet and several social media platforms. This rule, which would give EPA unprecedented authority to regulate virtually all waters and wet areas of the country, is based on questionable legal and scientific rationales and is being challenged in court by 32 states. It has been stayed by two federal courts from going into effect pending further judicial review.

On April 28, 2015, I wrote to the Government Accountability Office (GAO) to request an opinion on whether EPA's public relations activities violated the law, including annual Congressional appropriations law restrictions against use of federal funds for grassroots lobbying. GAO issued its legal decision on December 14, 2015, finding EPA had violated appropriations law restrictions against grassroots lobbying and covert propaganda. GAO also determined that these activities violated the Antideficiency Act.¹

The Office of Management and Budget plays an important role in ensuring agencies comply with the Antideficiency Act. Under section 1351 of the Antideficiency Act, the EPA Administrator is required to "immediately" report "all relevant facts and a statement of actions taken" to the President and Congress. Section 145 of OMB Circular A-11 directs agencies to submit reports of violations of the Antideficiency Act to the President through the OMB director.² A copy of this report is then transmitted to Congress and GAO. According to the circular, EPA's report must include all facts pertaining to the violation, explain whether the violation was knowing and willful, whether any employees have been disciplined, and whether EPA has adequate policies and control systems in place to prevent future violations. Pursuant to

¹ 31 U.S.C. § 1341.

² Office of Management and Budget Circular A-11 (Preparation, Submission, and Execution of the Budget)(2015), available at: https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2015.pdf.

the OMB circular, an agency may also use the report to explain any disagreement with GAO's finding that a violation has occurred.

More than two months have passed, but no such report has been transmitted to Congress despite the Antideficiency Act's requirement that a violation be reported "immediately." Instead, representatives of the executive branch have repeatedly sought to minimize the significance of the GAO legal decision. First, an EPA spokeswoman called critics of EPA's social media practices "backward-thinkers" and suggested such scrutiny and oversight were "empty attacks" and "deliberate distractions."³ Attorneys for the Department of Justice also recently filed, in connection with litigation challenging the EPA rule, a brief that mischaracterized the GAO decision as an opinion letter rather than the formal legal decision that an Antideficiency Act violation had occurred.⁴ EPA Administrator Gina McCarthy recently testified before the House Committee on Agriculture that she does not believe EPA violated the law, that EPA had not engaged in prohibited lobbying, and that EPA had followed OMB guidelines on social media. Administrator McCarthy also stated that OMB was reviewing a draft of EPA's report to the President and Congress. It remains unclear when the report will be completed and transmitted to the President and Congress.

Despite such attempts to dismiss GAO's finding, the Antideficiency Act itself carries significant penalties for violations. For example, employees violating the Antideficiency Act "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office."⁵ (Emphasis added.) Knowing and willful violations carry a fine of up to \$5,000 and two years jail time.⁶

A month after the GAO legal decision, EPA's website had still not been updated to correct the violations identified by GAO. Senator Ben Sasse and myself wrote to Attorney General Loretta Lynch on January 21, 2016, requesting an investigation into whether EPA officials were knowingly and willfully violating the Antideficiency Act, in part, with the apparent refusal to respond to GAO's decision.

Since that letter, EPA has updated at least one webpage that GAO found to be in violation of the restrictions on grassroots lobbying. EPA has added "exit disclaimers" to the links that take visitors from the EPA website to websites for the Natural Resources Defense Council (NRDC) and the Surfrider Foundation.⁷ However, the specific NRDC webpage linked to by EPA continues to contain the political advocacy message that GAO flagged as grassroots lobbying.⁸

³ "We won't back down from our mission," by Liz Purchia, EPA Connect Blog, December 17, 2015; available at: <https://blog.epa.gov/blog/author/lizpurchia/>.

⁴ See, Federal Defendants' Surreply in Opposition to Plaintiffs' Motion to Complete the Administrative Record, State of North Dakota, et al., vs. USEPA, Case No. 3:15-cv-00059-RRE-ARS (D. N.D.).

⁵ 31 U.S.C. § 1349(a).

⁶ 31 U.S.C. § 1350.

⁷ "Tell us why #cleanwaterrules," by Travis Loop, EPA Our Planet, Our Home Blog, April 7, 2015; available at: <https://blog.epa.gov/blog/2015/04/tell-us-why-cleanwaterrules/>.

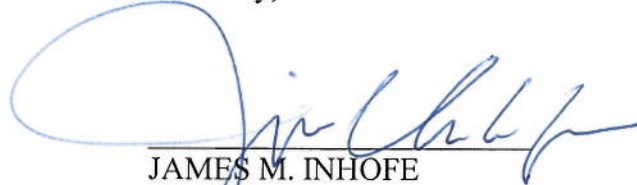
⁸ <http://www.nrdc.org/water/brewers-for-clean-water/>.

Following the GAO decision, Congress directed EPA as part of its annual appropriation “to coordinate with the Office of Management and Budget to ensure GAO’s findings are disseminated to communications offices throughout the government.”⁹ Despite EPA’s apparent disagreement with GAO and lackadaisical response to date about the Antideficiency Act violation, it is nonetheless expected that both OMB and EPA will fulfill this Congressional directive.

Accordingly, please provide a written response explaining what steps, if any, have been taken to comply with this directive to communicate GAO’s legal opinion to other federal agencies. In your response, please also include copies of all communications between OMB and EPA and other agencies concerning the December 14, 2015, GAO legal decision, as well as any guidance (or publicly available internet links) on the use of social media by federal agencies. If no such steps have yet to be taken, please explain why and when you expect them to be completed. Please also include in your response a status update on when the required Antideficiency Act report will be provided to Congress and an explanation on the role played by OMB in developing and/or reviewing the report.

Please provide your response no later than close of business March 14, 2016. Should your staff have any questions about this letter, please have them contact Byron Brown of the EPW Majority Staff at (202) 224-6176.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jim Inhofe", is written over a horizontal line.

JAMES M. INHOFE
Chairman,
U.S. Senate Committee
on Environment and Public Works

CC: The Honorable Lisa Murkowski,
Chairman, Subcommittee on Interior, Environment, and Related Agencies
U.S. Senate Committee on Appropriations

The Honorable Ben Sasse,
U.S. Senate

⁹ Consolidated Appropriations Act of 2016, PL. 114-113, Explanatory Statement, Division G-Department of the Interior, Environment, and Related Agencies Appropriations Act of 2016, available at: <http://docs.house.gov/meetings/RU/RU00/20151216/104298/HMTG-114-RU00-20151216-SD008.pdf>.